Supreme Court, U.S.
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No.

In The
Supreme Court of the United States

DAVID RANDAL WILLIAMS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Should the Supreme Court resolve an apparent conflict among the Circuit Courts to comport with the standard adopted by the Second Circuit in *Alessi v. United States*, 593 F.2d 476, 479 (2nd Cir. 1979), which interprets this Court's precedent in *Spies v. United States*, 317 U.S. 492, 496-500 (1943), and clarify that the felony offense of tax evasion requires a *mens rea* element evidencing some willful intent by the defendant to mislead, deceive, conceal or defraud as a part of the definition of the term "to evade," and extend the holding in *Cheek v. United States*, 498 U.S. 192 (1991) so that the alleged "affirmative act" must interfere in some manner with the IRS's ability to accurately calculate, collect and enforce any taxes due?

II. Is a devout Christian man, who represented himself before the IRS and the federal district court in an effort to challenge the scope and constitutionality of the federal tax laws, properly subject to a felony conviction for tax evasion even though he filed documents and sworn affidavits that explained his legal and religious objections; and, each year, he accurately reported absolutely all of the information necessary for the IRS to calculate any taxes due; and there was no fraud, deception or other attempt to mislead and/or conceal income, which was alleged in the indictment or even referenced during his Rule 11 Plea Colloquy?

III. Should the Supreme Court clarify the procedure for the appellate courts regarding whether a three-judge panel is required to properly conduct the "plain error" analysis articulated by this Court in *United States v. Olano*, 507 U.S. 725, 731 (1993), when the Court of Appeals seeks to summarily dismiss issues related to an alleged jurisdictional defect in the defendant's Rule 11 Plea Colloquy, which failed to properly advise him of the offense of felony tax evasion and there was a constitutionally deficient factual basis for the district court to accept his guilty plea because the Indictment charged and the trial court's colloquy alleged only that **"such failure to file [tax returns] was a willful attempt to evade a lawfully imposed duty"**? *See* Appendix E, at Pages 39a-40a.

IV. In light of the Supreme Court's majority opinion in *Nguyen v. United States*, 539 U.S. 69, 83 (2003), is it constitutionally permissible for only a two-judge panel of the Ninth Circuit Court of Appeals to summarily dismiss issues, without conducting any "plain error" analysis, related to the appellant's claim that there is a jurisdictional defect in his Rule 11 Plea Colloquy, which deprived him of his rights to Due Process of Law and Equal Protection Under the Law because the district court failed to advise him of the nature and cause of the charge against him for felony tax evasion; and there was not a constitutionally sufficient factual basis for the trial court to accept his plea of guilty where the alleged "affirmative act" was merely that "such failure to file [tax returns] was a willful attempt to evade a lawfully imposed duty?"

LIST OF PARTIES

The parties to the instant appeal are listed on the cover page to this Petition for Writ of Certiorari in that Petitioner was charged by Indictment in the United States District Court for the Southern District of California. The Internal Revenue Service (IRS) was the agency that provided assistance and investigation to the United States Attorney; and the counsel listed below as follows have represented Petitioner:

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PETITION FOR WRIT OF CERTIORARI

COMES NOW, Petitioner, David Randal Williams, and hereby respectfully petitions the Supreme Court of the United States for a Writ of Certiorari to review the unpublished judgment of the United States Court of Appeals for the Ninth Circuit, which affirmed the Judgment and Commitment of the United States District Court for the Southern District of California.

OPINIONS BELOW

The opinions and orders entered in this case are unreported. A copy of the July 19, 2007 Memorandum Decision of the United States Court of Appeals for the Ninth Circuit, which affirmed Petitioner's conviction for Felony Tax Evasion, is contained in Appendix A, Page 1a. A copy of the December 21, 2006 Order Dismissing the Issues on Appeal is contained in Appendix B, Page 4a. A copy of the Order and Judgment-Probation Violation-USDC Southern District is contained in Appendix C, Page 6a. A copy of the January 28, 2005 Judgment and Commitment-USDC Southern District of California is contained in Appendix D, Page 14a. A copy of the entire Rule 11 Plea Colloquy before the United States District Court is contained in Appendix E, Page 22a.

JURISDICTIONAL STATEMENT

Jurisdiction of this Court is invoked under Title 28 United States Code § 1254. The Memorandum Decision of the Ninth Circuit Court of Appeals was filed and entered on July 19, 2007. This Petition is timely pursuant to Supreme Court Rule 13.1.

Jurisdiction was invoked before the Ninth Circuit Court of Appeals pursuant to 28 United States Code § 1291; and Petitioner was originally prosecuted in the United States District Court for the Southern District of California for an alleged violation of 26 United States Code § 7201.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Constitutional and Statutory Provisions relied upon in the instant Petition, the First, Fourth, Fifth, and Sixth Amendments to the United States Constitution and 26 United States Code §§ 7201, 7203, and 7207 are set forth in the Appendix at Appendix H, Page 56a and Appendix G, Page 54a.

STATEMENT OF THE CASE

Petitioner, David Randal Williams, is a devout Christian man, who is able to trace his ancestry to the framers for the Constitution of the United States. Without providing all of the details for his arguments, Petitioner claimed that the assignment of a social security and other identifying numbers violated his religious beliefs; and the system for collection and enforcement of taxes denied him a representative form of government. Petitioner challenges his conviction for felony tax evasion from the United States District Court for the Southern District of California and subsequent sentence for violation of the terms of his Supervised Release, which was followed by the instant appeal to the Ninth Circuit Court of Appeals.

Petitioner seeks review of the Ninth Circuit decision, which was entered on July 19, 2007 in its Memorandum Order, Case No. 06-50304. He specifically challenges the court's refusal to conduct the *Olano* "plain error" analysis by a three-judge panel due to 9th Circuit Rule 27-1, advisory committee note (3)(c). A true and correct copy of the Ninth Circuit Court's Memorandum Order is attached hereto and incorporated herein as Appendix A, Pages 1a-3a. Petitioner contends that the dismissal of his issues on appeal, without a proper "plain error" analysis by only a two-judge panel, is in direct conflict with this Court's decision in *Nguyen v. United States*, 539 U.S. 69, 83 (2003); *United States v. Olano*, 507 U.S. 725, 731-735 (1993) and *United States v. Dominguez-Benitez*, 542 U.S. 74, 81-83 (2004).

Petitioner was originally charged by Indictment with only four (4) counts of Felony Tax Evasion in violation of 26 United States Code § 7201. Appendix F, at Pages 48a-53a. Significantly, Petitioner was not charged with either of the misdemeanor offenses for Willful Failure to File Income Tax Returns or Willful Failure to Pay Taxes pursuant to 26 United States Code § 7203. *Id.* Petitioner was also not charged with any counts in the Indictment for Filing a False or Fraudulent Return, which would have constituted the misdemeanor violation of Title 26 United States Code § 7207. Appendix G, Pages 54a-55a.

In the instant case, the Indictment alleged only that Petitioner **"caused his employer to fail to withhold income taxes...[and he] failed to file a U.S. individual tax return for tax year 2000. All in violation of Title 26 United States Code,**

Section 7201." Appendix F, at Page 53a. The trial court's Rule 11 Plea Colloquy repeatedly confirmed that Petitioner only **"agree that such failure to file [his tax return] was a willful attempt to evade a lawfully imposed duty".** *See* Appendix E, Pages 25a, 38a, 39a-40a. When Petitioner attempted to challenge this constitutional error and alleged that a jurisdictional defect exists from his Rule 11 Plea Colloquy, a two-judge panel of the Ninth Circuit Court of Appeals summarily dismissed these issues without any "plain error" analysis and affirmed Petitioner's Felony Tax Evasion conviction. Appendix B, Pages 4a-5a. *See also* 9th Circuit Rule 27-1 (3)(c), Appendix H, Page 58a.

The Ninth Circuit Court's dismissal of the Petitioner's issues on appeal, which were related to his efforts to obtain correction of the structural error during the plea colloquy, "foreclosed relief altogether" because the two-judge panel of that court refused to conduct any "plain error" analysis at all prior to ruling upon the government's motion to dismiss issues. Appendix B, at Page 4a. The Ninth Circuit also refused to address whether the term "to evade" includes a *mens rea* element evidencing some willful intent to mislead, deceive, defraud or conceal income and whether the alleged "affirmative act" must interfere in some manner with the IRS's ability to accurately calculate any taxes due. Appendix B, Page 5a.

Count 4 of the Indictment only alleged in pertinent part that:

> a. During calendar year 2000, defendant DAVID R. WILLIAMS caused his employer to

> fail to withhold federal income taxes from the $212,070 in wages and other compensation paid to defendant WILLIAMS.
>
> b. On or about April 15, 2001, defendant DAVID R. WILLIAMS failed to file a U.S. individual income tax return for the tax year 2000. All in violation of Title 26 United States Code, Section 7201. *See* Appendix F, at Page 53a.

Following several appearances before the United States District Court for the Southern District of California, Chief Judge Irma E. Gonzales presiding, wherein Petitioner represented himself and attempted to explain his legal and religious objections to the trial court's assertion of jurisdiction over the matter, Petitioner entered a Plea of Guilty to Count 4 of the Indictment for Felony Tax Evasion. Appendix E, Page 44a. At his Disposition Hearing on September 29, 2004, the trial court conducted its Rule 11 Plea Colloquy with Petitioner, however the court repeatedly asserted, **"And do you agree that such failure to file [a Tax Return for calendar year 2000] was a willful attempt to evade a lawfully imposed duty?"** Appendix E, Pages 39a-40a.

Petitioner was sentenced to serve a term of incarceration for one year and a day; and the trial court imposed a term of Supervised Release for a period of two years on January 28, 2005. Appendix D, Pages 14a-16a. After he served the term of incarceration, United States Probation filed an Affidavit alleging a violation of the Conditions of Supervised Release. Hearings were conducted on

March 20, 2006 and April 20, 2006; and Petitioner was found to have violated the Conditions of Supervised Release. The District Court sentenced Petitioner to serve an additional term of incarceration for six months and imposed a further Special Condition that required Mental Health Treatment. Appendix C, Pages 6a-13a.

Petitioner timely filed a document, which he captioned **"Notice of Motions-Right of Allocution, Objecting to Sentencing in the Nature of a Writ of Error-Notice of Appeal,"** which the trial court treated as a *pro se* Notice of Appeal. Appendix A, Pages 1a-3a. After Petitioner's counsel filed Appellant's Opening Brief to the Ninth Circuit Court of Appeals and asserted that the trial court had committed "plain error" during the Rule 11 Plea Colloquy, the government filed a Motion to Dismiss Issues on Appeal. Without conducting any "plain error" analysis of the alleged constitutional error, the Ninth Circuit dismissed the first four issues on appeal; and ordered the filing of a replacement brief. Appendix B, Pages 4a-5a.

The Ninth Circuit's Order, which dismissed the issues related to his assertion of a jurisdictional defect in the Rule 11 Plea Colloquy, was submitted to and ruled upon by only a two-judge panel; and the Ninth Circuit's Memorandum Opinion entered on July 19, 2007 held that Petitioner was not entitled to have a three-judge panel decide the government's Motion to Dismiss pursuant to 9th Circuit Rule 27-1, advisory committee note (3)(c). Appendix A, Pages 1a-3a; Appendix H, Page 58a. Accordingly, the Ninth Circuit Court never conducted any "plain error" analysis; and

the court held that Petitioner was not entitled to have a three-judge panel even consider the issue of whether the asserted constitutional error in his Rule 11 Plea Colloquy was jurisdictional and prejudicial. Appendix A, Page 3a.

REASONS FOR GRANTING CERTIORARI

The instant Petition for Writ of Certiorari raises important, constitutional issues related to whether a defendant, who asserts legal and religious objections to the enforcement and collection of federal income taxes but provides absolutely all of the information necessary for the Internal Revenue Service (IRS) to accurately calculate any taxes due, can properly be convicted of felony tax evasion; and should the Supreme Court resolve conflicts among the circuits by clarifying that an appellant is entitled to the "plain error" analysis from *Olano* and *Dominguez-Benitez* by a three-judge panel for an alleged jurisdictional defect in his Rule 11 Plea Colloquy when there is a constitutionally deficient factual basis for the district court to accept his guilty plea without a *mens rea* element evidencing some willful intent to mislead, deceive, defraud or conceal income that interferes with the IRS's ability to accurately calculate and enforce any taxes due.

The federal circuit courts have expressed a divergence of views and opinions regarding the meaning of the "affirmative act" requirement. Although each of the circuits agrees that an "affirmative act" is required as a necessary element to the offense of Felony Tax Evasion, there appears to be confusion and an absence of uniformity. For example,

the Third Circuit has held that the attempted offense of tax evasion's "affirmative act" requirement in a prosecution for evasion of tax assessment "is satisfied with [the] filing of [a] false return." *United States v. McGill*, 964 F.2d 222, 230 (3rd Cir. 1992). By contrast, however, the Fifth Circuit has held that a "Defendant charged with the offense of felony tax evasion, for failing to file timely tax returns and submitting W-4 forms with inaccurate information, was entitled to [an] instruction on [the] lesser-included offense". *United States v. Doyle*, 956 F.2d 73, 76 (5th Cir. 1992).

Implicit also in the instant Petition are important constitutional questions involving Petitioner's First Amendment Rights of Religious Expression and Right to Redress Grievances, his Fourth Amendment Right Against an Unreasonable Seizure of his Person and Property, his Fifth Amendment Rights to Due Process of Law and Equal Protection Under the Law, and his Sixth Amendment Right to Know the Nature and Cause of the Charges Against Him. Appendix H, Pages 56a-57a. Petitioner respectfully asserts that the Supreme Court should resolve the wide disparity of standards applicable among the various circuits; and this Court should clarify the proper procedure for conducting a "plain error" analysis by a three-judge panel of circuit court judges.

ARGUMENT

As suggested above, there is a wide divergence of opinions and standards among the various circuits regarding whether the "affirmative act" requirement from the Supreme Court's opinion in *Spies v. United States*, 317 U.S. 492, 499 (1943) necessarily includes a

further *mens rea* element evidencing some intent to mislead, deceive, defraud or conceal income that interferes with the IRS's ability to accurately calculate, enforce and collect any taxes due. In fact, it may be that some confusion arose following this Court's decision in *Cheek v. United States*, 498 U.S. 192, 194 (1991), when the majority explained "This case turns on the meaning of the word 'willfully' as used in §§ 7201 and 7203." *Id.*

To the extent that *Cheek v. United States*, addressed any *mens rea* element for the offense of felony tax evasion, it is important to remember that *Cheek* was fundamentally a jury instruction case, which raised the specific question of whether the defendant's subjective beliefs about the applicability and constitutionality of the federal tax laws were applicable to him, and the Supreme Court declined to apply an "objectively reasonable" standard. *Id.* 498 U.S. at 200-202. It is important to note that both felony tax evasion and the misdemeanor offense of Willful Failure to File include the "willfulness" element. However, in the instant case, the trial court clearly believed, and the Indictment only alleged that Petitioner's "failure to file [the tax return] was a willful attempt to evade a lawfully imposed duty." *See* Appendix E, at Pages 39a-40a; Appendix F, at Page 53a.

Although the standard applied by the Southern District of California seems constitutionally deficient on its face, this standard actually comports with the Third Circuit's explanation that "If the false filing is shown to be willful, the offense [of felony tax evasion] is complete with the filing." *United States v. McGill*,

964 F.2d at 230. An entirely different result is reached however, when the Fifth Circuit's analysis of the "affirmative act" requirement is applied because that court has held that the willful failure to file tax returns, even combined with providing false information in the defendant's W-4 Form, does not constitute the offense of Felony Tax Evasion. *United States v. Doyle*, 956 F.2d at 76. *See also* Appendix F, Page 53a.

The Fifth Circuit's analysis in *Doyle* is similar to the Second Circuit Court of Appeals' decision in *Alessi v. United States*, wherein the defendant was found to have abandoned his direct appeal because the trial court lacked a sufficient factual basis to accept his guilty plea. *Alessi v. United States*, 593 F.2d 476, 479 (2nd Cir. 1979). Had Petitioner in the instant case appealed his conviction to the Second Circuit, following *Alessi*, he would have clearly been entitled to correction of the jurisdictional error because there was not a sufficient factual basis to accept his plea of guilty to Felony Tax Evasion. *Id.* Similarly, the Fifth Circuit's analytical approach would have resulted in correction of the "plain error" because, even if Petitioner willfully included false information in his W-4 Form, he would not have been guilty of Felony Tax Evasion. *United States v. Doyle*, 956 F.2d 73, 75-77 (5th Cir. 1992).

Indeed, it seems only logical that the offense of Felony Tax Evasion could not possibly be completed with only the same elements necessary for proving a violation of the misdemeanor offense, Filing a False Return. *Id.* It also seems improper that the government is able to avoid correction of a "plain

error" by filing a Motion to Dismiss Issues on Appeal within the Ninth Circuit; and a panel of only two judges is able to summarily dismiss those issues, without conducting the analysis articulated by this Court in *Olano* and *Dominguez-Benitez*. *United States v. Olano*, 507 U.S. 725, 731-735 (1993); *United States v. Dominguez-Benitez*, 542 U.S. 74, 81-83 (2004).

Petitioner respectfully requests that the Supreme Court extend the holding in *Cheek* in order to clarify that the very same "affirmative act" of committing the misdemeanor offense, Willful Failure to File or Filing a False Return, cannot serve as the sole factual basis for Felony Tax Evasion because such an interpretation would effectively nullify this Court's holding in *Spies*. Petitioner specifically requests that this Court adopt the standard applied by the Second Circuit in *Alessi v. United States*, 593 F.2d at 479, which held that the trial court committed reversible, plain error even though the defendant abandoned his direct appeal, because he was not properly advised of the nature and cause of the felony offense of tax evasion and there was a constitutionally deficient factual basis for the court to accept his plea of guilty. *Id.*

It is important for the Supreme Court to provide a uniform and appropriate procedure for the circuits to conduct a "plain error" analysis in response to a government's motion to dismiss issues on appeal and decide whether only a two-judge panel of the court is permitted to conduct such analysis. Petitioner suggests that this Court interpret 9th Circuit Rule 27-1 in light of the requirement of a three-judge panel as explained in *Nguyen v. United States*, 539 U.S. at 83, and explain the proper procedure for conducting the "plain error"

review articulated in *United States v, Olano*, 507 U.S. at 731-735 and *United States v. Dominguez-Benitez*, 542 U.S. at 81-83.

The Ninth and Tenth Circuits have provided less clear analytical standards for distinguishing between the misdemeanor offense of Failure to File and/or Filing a False Return than the approaches described above by the Second, Third and Fifth Circuits. The Tenth Circuit has explained that an "affirmative act" requires "more than the passive failure to file a tax return" when it becomes due; rather, it requires "a positive act of commission designed to mislead or conceal." *United States v. Payne*, 978 F.2d 1177, 1178 (10th Cir. 1992), *cert. denied*, 508 U.S. 950 (1993). While this standard might seem more clear at first glance, it does not resolve the issue of whether the filing a W-4 Form, which included inaccurate information and avoided withholdings by a defendant's employer, would serve to satisfy the same "affirmative act" requirement for Felony Tax Evasion.

By comparison, the Ninth Circuit has explained that "while the affirmative act must generally 'serve [ ] the purpose of evasion,' Congress did not intend 'to establish a hierarchy of attempts or evasions and limit § 7201 to those of a more deceitful or troublesome character.'" *United States v. Carlson*, 235 F.3d 466, 468-469 (9th Cir. 2000). Admittedly, the defendant in *Carlson* seems to have involved distinct affirmative acts such as using false social security numbers, misleading dates of birth and secret bank accounts, however this explanation does not address whether this standard would be consistent with the approach

prescribed by the Second, Third, Fifth or Tenth Circuits.

Unfortunately, since the Ninth Circuit refused to conduct any "plain error" analysis in the case at bar, it remains entirely unclear which approach the Ninth Circuit Court of Appeals would favor. Accordingly, Petitioner respectfully requests that this Court resolve the conflict among the circuits, clarify that there is a distinction between the misdemeanor offense and felony tax evasion, and provide a clear procedure for conducting the plain error analysis by a three-judge panel in response to the government's motion to dismiss issues related to an appellant's request for relief due to an alleged "plain error" defect in the trial court's Rule 11 Plea Colloquy.

CONCLUSION

Based upon the foregoing Petition, Petitioner respectfully prays that this Honorable Court grant a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit for the reasons set forth herein.

Respectfully submitted,

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